

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

STATE OF MINNESOTA, MINNEAPOLIS
VETERANS HOME,

EMPLOYER

-and-

AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,
COUNCIL #5,

ARBITRATOR'S AWARD
BMS Case No. 06-PA-1225
EMPLOYEE DISCHARGE

UNION.

ARBITRATOR:	Rolland C. Toenges
GRIEVANT:	Saleh Idris
DATE OF GRIEVANCE:	April 21, 2006
DATE OF HEARING:	November 29, 2006
CLOSE OF HEARING:	December 29, 2006
DATE OF AWARD:	February 9, 2006

ADVOCATES

FOR THE EMPLOYER:

Trina Chernos, Principal L.R. Representative
MN Department of Employee Relations

FOR THE UNION:

Loretta Meinke, Bus. Representative
AFSCME, Council #5

WITNESSES

Kristin Edstrom, Former RN Manager
Jungyeon Chaelee, Registered Nurse
Kathleen Salseg, Licensed Practical Nurse
Nancy F. Dahl, Personnel Services Manger
Dee Reinking, Director, Human Resources

Saleh Idris, Grievant
Shawn Barry, Chief Stewart

ALSO PRESENT

Pat Richie, Chief Stewart
Barbara Sasik, Bus. Representative

ISSUE

Was the Grievant discharged for Just Cause?

JURISDICTION

The matter at issue, whether discharge of the Grievant was for just cause, came on for hearing pursuant to provisions contained in the Collective Bargaining Agreement (CBA) between the Parties.¹ The CBA, in Article 16, DISCHARGE, provides as follows:

“Section 2. Union Representation. The Appointing Authority shall not meet with an employee for the purpose of questioning, in person or by a phone interview, the employee during an investigation that may lead to discipline without first offering the employee an opportunity for Union representation, and such meeting shall not take place until a Union representative is available or is released by his/her supervisor. . .”

“Section 5. Discharge. The Appointing Authority shall not discharge any permanent employee without just cause. If the Appointing Authority feels there is just cause for discharge, the employee and the Local Union shall be notified, in writing, that the employee is to be discharge and shall be furnished with the reason(s) therefore and the effective date of the discharge. The employee may request an opportunity to hear an explanation of the evidence against him/her, to present his/her side of the story and is entitled to union representation at such meeting, upon request. The right to such meeting shall expire at the end of the next scheduled work day of the employee after the notice of discharge is delivered to the employee unless the employee and the Appointing Authority agree otherwise. The discharge shall not become effective during the period when the meeting may occur. The employee shall remain in pay status during the time between the notice of discharge and the expiration of the meeting. However, if the employee was not in pay status at the time of the notice of discharge, for reasons other than an investigatory leave, the requirement to be in pay status shall not apply.”

¹ The Parties are signators to a Collective Bargaining Agreement in effect from July 1, 2005 through June 30, 2007. (Joint Exhibit #J-A)

“Section 6, Appeal Procedures. Any disciplinary action imposed upon an employee may be processed as a grievance through the regular grievance procedure as provided in Article 17.”

Article 17, GRIEVANCE PROCEDURE, of the CBA provides as follows:

“Section 1. Grievance Procedure. A grievance is defined as a dispute or disagreement as to the interpretation or application of any term or terms of this Agreement.”

Section 3. Arbitration. Except as indicated in Section 4 below, all arbitrations arising under this Agreement shall be conducted by an Arbitrator to be selected by mutual agreement of the Employer and the Union. If the parties fail to mutually agree upon the arbitrator, the parties shall request a list of five (5) arbitrators from the Bureau of Mediation Services. Both the Employer and the Union shall have the right to strike two (2) names from the list. A coin shall be flipped to determine which party shall strike the first name. The other party shall then strike one (1) name and the process shall be repeated and the remaining person shall be the arbitrator.

Section 5. Arbitrator's Authority. The arbitrator shall have no right to amend, modify, nullify, ignore add to, or subtract from the provisions of this Agreement. He/she shall consider and decide only the specific issue or issues submitted to him/her in writing by the parties of this Agreement, and shall have no authority to make a decision on any other matter not so submitted to him/her. The arbitrator shall be without power to make decisions contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The decision shall be based solely upon the arbitrator's interpretation and application of the expressed terms of this agreement and to the facts of the grievance presented.

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The Arbitration Hearing was conducted as provided by the terms and conditions of the CBA and the Public Employment Labor Relations Act (MS. 179A.01-30). The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute.

BACKGROUND

The Minneapolis Veterans Home provides nursing and assisted care for veteran residents. A motto of the Home is “Their Service, Our Duty.”

The veterans residing at the Home are considered “Vulnerable Adults.” The level of care needed varies from veteran to veteran. Some cannot walk, eat, groom, toilet, or dress themselves without assistance. They depend on caregivers for survival and comfort.

The team of caregivers includes Registered Nurses (RNs), Licensed Practical Nurses (LPNs), and Human Services Technicians HSTs). The HSTs provide hands-on care for the veterans. The HSTs work independently and with minimal supervision. One of their duties is to provide the veterans with basic necessities such as drinking water, referred to as “passing water.”

The Grievant, Mohamed Saleh Idris, a Human Services Technician, had been employed for approximately nineteen (19) months at the time of his discharge. The Employer’s decision to discharge the Grievant was prompted by an incident on April 8, 2006. The incident involved a dispute between the Grievant and another employee over the use of a cart used to transport water and other supplies to veterans rooms.

Based on the Employer’s evaluation of the Grievant’s actions during the above referenced incident, which it considered a violation of its “Workplace Violence Policy,”² and “Operating Policies and Procedures,”³ the Employer issued a discharge notice to the Grievant dated April 17, 2006.⁴

² Joint Exhibit #2

³ Joint Exhibit #3

⁴ Joint Exhibit #1.

Thereafter, the Union filed a Grievance on behalf of the Grievant, claiming violation of the CBA, including, but not limited to Article 16.⁵ The Parties were not able to resolve the matter via the Grievance Procedure and the dispute was advanced to the arbitration step resulting in the instant proceeding.

EXHIBITS

- J-A, Collective Bargaining Agreement, July 1, 1005 through June 30, 2007.
- J-1, Letter of Discharge, dated April 17, 2006.
- J-2, Workplace Violence Prevention Policy and Plan dated March 24, 2005.
- J-3, Operating Policy and Procedures, revised June 9, 2004.
- J-4, Staff meeting notes with Work Rules attached, dated April 2005.
- J-5, Investigation notes and statements from witnesses regarding incident at issue.
- J-6, First Report of Injury and investigative statement of Christina Magnuson.
- J-7, Mid Probationary Appraisal of Grievant, dated January 26, 2005.
- J-8, Supervisor notes regarding incident involving Grievant, dated July 3 and 11, 2005.
- J-9, Supervisor notes regarding incident involving Grievant, dated October 25, 2005.
- J-10, Supervisor notes and Letter of Expectations regarding Grievant, dated February 27, 2006 and March 17, 2006.
- J-11, New Employee Orientation and checklist, dated October 1, 2004.
- J-12, Performance Review of Grievant, dated April 11, 2005 and October 10, 2005.
- J-13, Grievance dated April 12, 2006.
- J-14, Affirmative Action Complaint Form by Grievant, dated April 4, 2006.
- J-15, Grievant's complaint regarding his supervisor dated March 13, 2006.
- J-16, Grievant's appeal to Head of Nursing and Union regarding his Supervisor.
- J-17, Letter from Nancy Dahl to Loretta Meinke, regarding incident involving Grievant.
- E-18, Violence Prevention Incident Report regarding alleged assault by Grievant.
- U-19, Notice of discharge to another employee for pushing a cart into an employee.
- U-20, Notice of discipline to another employee for use of inappropriate language.

⁵ Joint Exhibit # 13.

U-21, Notice of discipline to another employee for substandard performance.

POSTIONS OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSTION WITH THE FOLLOWING:

1. The Employer had Just Cause to discharge the Grievant.
2. The Grievant violated the “Workplace Violence Policy” by committing physical violence toward a co-worker on April 8, 2006.
3. The “Workplace Violence Policy” prohibits “perceived or real violent acts or threats.
4. The “Workplace Violence Policy” informs employees that “strong disciplinary action, up to and including discharge” will be taken for behaviors such as pushing, stalking, bullying and inappropriate touching – it does not require that a victim must suffer actual injury for a violation to occur.
5. It takes a special kind of employee to work at the Veterans Home and it is not a good fit for everyone.
6. The Veteran’s needs come first, not personal interests or vendettas.
7. Although the Grievant had received “satisfactory” ratings during his nineteen (19) month tenure, he had a rather colorful employment history.
8. Prior to the April 8, 2006 incident, resulting in the Grievant’s discharge, he had been verbally coached on several occasions regarding interpersonal skills, failing to respond to call lights, and had been investigated for violating the Workplace Violence Policy.
9. The Grievant had, prior to the incident resulting in his discharge, crossed off his work area on the assignment sheet and left for another work area of his choice.
10. Less than a month before the incident resulting in his discharge, the Employer issued the Grievant letter of expectations following a complaint of mistreating a veteran resident.
11. The Grievant, on April 8, 2006 attempted take a cart away from another employee using physical force, striking her forcefully with the cart several times.

12. The Grievant pushed and pulled the cart so violently that it knocked supplies off the shelves.
13. The Grievant's behavior created such a commotion in demanding "his" cart that several employees were interrupted from their tasks serving veteran residents.
14. The Grievant failed to comply with the orders of two supervisors, who were eyewitnesses to the incident, to let go of the cart.
15. Co-workers offered the Grievant their cart in an effort to end the incident, but he refused the offer.
16. Other employees have expressed their concern about the Grievant having a "mean streak" and a "short fuse."
17. The Grievant has failed to acknowledge responsibility for his actions or express any remorse.
18. The record shows the Grievant's mentality cannot be changed.
19. The Grievant can no longer be trusted with the care of vulnerable adults.
20. The Veteran's Home cannot simply wait to see whether the Grievant's anger will further escalate and cause greater harm to co-workers and residents.
21. Although the Grievant felt persecuted by his supervisor, he did not act out against his supervisor but became violent with co-worker with whom, by his own admission, he had no problems - this is what causes the Grievant's conduct to be so inexplicable and reprehensible.
22. When the common condensed "just cause" test is applied, (1. whether the misconduct occurred, and 2. whether the misconduct justified the level of discipline imposed), it is clear that the Grievant violated the "Workplace Violence Policy."
23. The Union has not contested the Policy itself or its business necessity.
24. The Grievant acknowledged in writing that he received the Policy on September 28, 2004.
25. The Grievant received an updated copy of the Policy in April 2005, which also prohibited threats and fighting.
26. The Grievant was coached several times on the Policy by his supervisor.

27. Most importantly, the Grievant demonstrated understanding of the Policy by himself filing a “Workplace Violence Policy” complaint against a co-worker.
28. Any attempt by the Grievant to deny knowledge or understanding of the Policy, or the Work Rules, is simply not credible.
29. The victim of the Grievant’s behavior (Christina) cried out for help for she perceived it as a violent, intimidating assault.
30. The facts contradict the Grievant’s claim that his supervisor persecuted him and is why he was terminated.
31. The Grievant’s supervisor objectively investigated each allegation against the Grievant, using corrective action such as coaching and a letter of expectations issue less than one month before the April 8, 2006 incident.
32. The Supervisor (Kristin Edstrom) was not working at the time of the April 8, 2006 incident and had nothing to do with the Grievant’s altercation with Cristina.
33. Several other employees who had no reason to misrepresent what they observed witnessed the Grievant’s behavior during the April 8, 2006 incident.
34. In the instant case, progressive discipline is not a necessary prerequisite as the Grievant’s offense in the April 8, 2006 incident is sufficiently serious, in and of itself, o warrant discharge.
35. In fact, the April 8, 2006 incident was the final act in a long line of incidents, which revealed the Grievant’s propensity for violence and inability to control his temper.
36. The Grievant displayed a substantial lack of concern for his employment, despite very recent warnings he was given about workplace behavior and respect for co-workers.
37. Strict enforcement of rules and polices is necessary at the Veterans’ Home.
38. Living conditions for the vulnerable veterans under the Home’s care are monitored by the Department of Health, veterans’ service organizations and the state legislature.
39. The evidence shows that the Veterans Home has administered the “Workplace Violence Policy” consistently – at least three other employees have been discharged for violating the Policy.

40. The Veterans Home takes a “Zero tolerance” approach to workplace violence to protect its employees and the veterans’ quality of life.
41. The Veterans Home should not be forced to wait until the Grievant commits another serious act of violence before it is allowed to discharge him.
42. The Grievant’s argument that he did not have Union representation at one step in the grievance process is not fatal to the Employer’s case. The evidence shows the Grievant knew how to secure a Union Representative. In fact, one Union Representative chose not to see him. Further, he had three Union Representatives at Step three (3) of the grievance procedure.
43. The Employer has proven with clear and convincing evidence that the Grievant violated the “Workplace Violence Policy.” Given the Grievant’s employment history and the severity of his misconduct on April 8, 2006, corrective action is not a viable option. Accordingly, the Employer asks that the grievance be denied.

THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:

1. This case is about disparate treatment – one employee (Grievant) got fired, the other received no discipline.
2. Although the Grievant’s behavior during the April 8, 2006 incident wasn’t appropriate, neither was it for the other employee involved (Christina).
3. Both the Grievant and Christina were responsible for the incident because they were active participants.
4. Neither the tugging match over possession of the cart, nor the Employer’s policies are in question, only the severe disparate treatment handed down to only one of the participants.
5. Either of the participants could have let go of the cart, but neither did until finally Christina let go.
6. In the instant case, we have two (2) employees engaged in the same behavior but only one got disciplined, and it was the most severe of disciplines, a discharge.
7. This type of behavior is nothing new at the Veterans Home and the Employer is inconsistent in handing down discipline for it.

8. The evidence does not support Christina's allegation of pain – she worked the remainder of her shift and also the next day. Witness Chaelee testified that, in her opinion, Christina didn't hurt much and worked the next shift without pain.
9. Christina's complaint that her left arm was red and her shoulders were sore does not prove anything.
10. Christina went to the Doctor two (2) days later after filling out a First Report of Injury. The doctor did not impose any work restrictions. Filling out a First Report of Injury form is merely an allegation, not a fact.
11. Christina's claim of redness in her arm was not supported by the testimony of Jackie who saw no redness when looking at Christina's arm.
12. Jackie testified that she was not surprised by the incident as she was waiting for something to happen to Christina who she described as an "accident waiting to happen."
13. Jackie testified that Christina is down in the office all the time complaining about arguments between staff, the heavy workload and how tired she is.
14. Witness Nancy Dahl testified that violence in the workplace could also be verbal.
15. Disciplined administered to other employees who have committed verbal and physical violations of the "Workplace Violence Policy" did not rise to the level of discharge.
16. The one employee previously discharged for violation of the "Workplace Violence Policy" at least had progressive discipline.
17. The Grievant's appeal to management for help in his concern that his supervisor was singling him out was met with no response. However, just four (4) days after submitting the appeal for help, he received a Letter of Expectation.
18. The Grievant filed an Affirmative Action Complaint requesting a change in work location because he realized there were irreconcilable differences between his supervisor and himself – again there was no management intervention
19. On April 11, 2006, the Grievant sent a letter to the Director of Nursing informing her of problems and threats of discharge being made to him by his supervisor and Christina.

20. The Grievant liked working at the Veterans Home and asked the Employer's support in helping him to be successful with his career but received nothing.
21. The discharge should be overturned and the Grievant made whole on wages and benefits.

WITNESS TESTIMONY

Employer witness, Kristin Edstrom, testified that she was the Grievant's supervisor for about 18 months. She testified that the Grievant was given information on the "Workplace Violence Policy" during orientation and during staff meetings. Supervisors were required to review the Policy with staff due to an incident that occurred at the Home. She testified that the Grievant signed for receipt of the Policy at his orientation on September 28, 2004.⁶

Edstrom testified that the Rules⁷ are posted on bulletin boards and the Policy⁸ is placed in the mailboxes of all employees. An updated copy of the Rules⁹ was reviewed in an April 2005 Staff Meeting with employees.

Edstrom described the Grievant as "sully" for the most part. He did the job but not always well. She talked to him numerous times about his performance (i.e. dentures in cup without being cleaned). She felt he was not responsive to her coaching and did not always listen. She said the Grievant complained he was being picked on because he did not see her talking to other employees about their performance as she did with him. She said the Grievant was one of three employees with which she experienced problems.

Edstrom referenced her personal notes¹⁰ memorializing a conversation she had with the Grievant regarding an incident where he felt another employee threatened him.

⁶ Joint Exhibit #11.

⁷ Joint Exhibit #3.

⁸ Joint Exhibit #2.

⁹ Joint Exhibit #4.

¹⁰ Joint Exhibit #8.

Edstrom described the Grievant's probationary performance evaluation¹¹ where she had discussed improvement needed in safety while bathing residents. He had failed to lock the chair and a resident fell to the floor. There was no injury to the resident and she passed him on probation and did not take disciplinary action.

Edstrom testified to an incident that occurred in October 2005 where another employee reported to have been threatened by the Grievant.¹² Edstrom said she took no action, other than to warn the Grievant that the zero tolerance policy on violence, because of conflicting statements between the alleged victim and the Grievant. There were no witnesses to the alleged incident.

Edstrom testified to her personal notes regarding an incident¹³ where she had coached the Grievant due to his failure to properly care for a resident – he did not respond to the call light and was rough with the resident. Edstrom issued the Grievant a “letter of Expectation” outlining what she expected of him in the future.¹⁴

Edstrom testified that on April 9, 2006, she had a call from an employee regarding a “First Report of Injury”¹⁵ from Christina Magnuson. Edstrom said she investigated the matter and interviewed Magnuson, the Grievant plus several witnesses to the incident.¹⁶ Edstrom summarized the results of her investigation as set forth in the investigative reports.¹⁷ Magnuson reported that the Grievant's assault on her caused a mark on her arm and crushed her cigarettes. The witnesses had told him to stop but he continued until Magnuson let go and left the area. Some of the witnesses offered the Grievant use of

¹¹ Joint Exhibit #7.

¹² Joint Exhibit #9.

¹³ Joint Exhibit #10.

¹⁴ Joint Exhibit #10.

¹⁵ Joint Exhibit #6.

¹⁶ Witnesses to the April 8, 2006 incident, between the Grievant and Christina Magnuson, interviewed by Edstrom included: Kathy Salseg, LPN, Jungyeon Chaelee, RN, Ibsa Deressa, HST, Genet Habteyes, HST and Pierre Tanoe.

¹⁷ Joint Exhibit #5.

their carts but the Grievant said no. Magnuson said later the Grievant's friend (Ibsa) followed her around and said he knew where she lived.

Edstrom testified that she notified the Grievant of her desire to meet with him at 2:45 p.m. on April 10, 2006 giving him time to arrange for a Union Representative before the 3:30 meeting time. Edstrom said that the Union Representative contacted refused to sit in on the investigative interview. The Grievant signed a statement that he was unable to find an AFSCME representative for the investigative interview.¹⁸

Edstrom testified that the Grievant needed the cart for about 10 to 15 minutes to serve about 10 residents. She said the Grievant could have effectively used the time to do a number of other work activities while the cart was use.

Edstrom testified that she reviewed the situation with Nancy Dahl, Personnel Services Manager and they decided to discharge the Grievant rather than wait for something more serious to happen.

On cross-examination, Edstrom acknowledged that performance evaluations prepared on the Grievant April 11, 2005 and October 10, 2005 were favorable and contain positive comments including "valued team player, maintains flexibility, provides care with kindness, a cheerful attitude, willing to help others, welcomes new staff, shares knowledge with new staff and makes them feel welcome."

On cross-examination, Edstrom testified that she didn't know if Christina had help [following the incident with the Grievant] from her co-worker due to a sore shoulder.

Edstrom testified that Peter Laryea's complaint about the Grievant (October 25, 2005)¹⁹ occurred after the Grievant's October performance evaluation. Edstrom said the Grievant's next performance evaluation was to have been in April 2006 and would have

¹⁸ Joint Exhibit #5, page 7.

¹⁹ Joint Exhibit #9.

been less favorable than the previous evaluations. It would have generally reported him as minimally meeting requirements and would have included specific areas requiring improvement. Edstrom testified that the complaint about the Grievant by Lorrie Paklonnskygrimsley, LPN²⁰ also occurred after the October 2005 performance evaluation

Employer witness, Jungyeon Chaelee, RN, testified that she witnessed the April 8, 2006 incident involving the Grievant and Christina. She said she heard noise/fighting and was called to the site. The Grievant was attempting to pull the cart away from Christina and employees witnessing the altercation were telling the Grievant to “let her go.” Chaelee said Christina worked the evening of the incident but left early the next day saying she had pain.

On cross-examination, Chaelee testified that the incident lasted a few minutes. Christina was at the end of the cart and the Grievant was behind her and reaching around Christina to pulling the cart from her.

Employer witness, kathleen Salseg, LPN, testified that she witnessed the April 8, 2006 incident between the Grievant and Christina. She said she heard voices/fighting in doorway of supply room. Christina was hanging onto the cart and the Grievant was behind her pulling back on it. Salseg said she told the Grievant to “let it go – step over her this way” and the Grievant said, “no, this is my cart” and kept pulling it into Christina.” Salseg said she was sure the residents overheard the incident. Salseg said that when she arrived at the site several other employees were already there and witnessed the incident. Salseg testified that the information contained in her statement²¹ given to Edstrom was correct.

On cross-examination, Salseg testified that she didn’t see the crushed cigarettes until after Christina returned from scheduling. Salseg acknowledged that sometimes residents get loud with each other.

²⁰ Joint Exhibit #10.

²¹ Joint Exhibit #5, page 8.

On re-direct, Salseg testified that she is 100% sure that the Grievant and Christina were on the same end of the cart.

Employer witness, Nancy Dahl, RN, testified that she has oversight for five residential veterans facilities and has been with the State of Minnesota for some 30 years in various capacities, including Director of Clinical Services, Health Inspector and Director of Nursing. Dahl gave an overview of funding sources, the type of resident and nature of health conditions encountered in the Veterans Homes. Dahl testified that HSTs are crucial to caring for the Homes residents.

Dahl testified that the “Workplace Violence Policy” was updated in November 2005 but the Policy has been in effect for some time. The Policy was developed after an employee pulled a gun and shot a supervisor in 1999. It was then recognized that a policy prohibiting violent behavior, including threats and intimidation was necessary.

Dahl testified that she is involved in negotiating supplemental collective bargaining agreements with the Unions and is an Employer representative in negotiating the Master CBA. Dahl pointed out that the CBA contains an Article setting forth provisions for a safe work environment.²²

Dahl testified that when there is a matter of alleged misconduct, the supervisor conducts the investigation and brings the results to management for review and comment. Dahl testified that she had a role in the decision to discharge the Grievant. As Director of Nursing, she was aware of the incident through the Morning Report and the investigative report by Kristin Edstrom. Dahl testified that management, in determining the level of discipline, considers the severity of the incident, the employee’s work record and the tenants of “Just Cause” as called for in Article 16, Section 1, of the CBA.

²² Joint Exhibit #A.

Dahl testified that the Grievant had been coached previously about his conduct and there had been complaints from a number of sources over a significant period of time – the Grievant was not acknowledging that he was a part of problem.

Dahl testified that the Employer would not condone threats or physical violence. Dahl testified that she heard nothing at the third step grievance meeting that altered her conclusion that the appropriate discipline should be discharge. Dahl testified that she did not find the Grievant showing any remorse for what he had done. Dahl testified that given the Grievant's pattern of behavior it is clear that he does not follow direction.

Dahl testified that she wasn't aware of the Grievant's formal complaint about his supervisor (Kristin Edstrom), dated March 13, 2006 and if so she would have asked Edstrom to deal with it. Dahl testified that if the Human Resources receives a document it contains a stamp in the upper right hand corner as appears on Joint Exhibit #6.

On cross-examination, Dahl testified that when an affirmative action complaint is filed, Human Resources decides by whom and how the matter is to be investigated. Dahl noted that the Grievant's Affirmative Action Complaint²³ does not contain the Human Resources stamp indicating it was not received. Dahl acknowledged that sometimes employees don't care for each other and make a more critical observation. Dahl testified that most State agencies have a "Workplace Violence Policy."

On re-direct, Dahl testified that termination could be the result of filing a false report. Dahl testified that the CBA does not dictate how an investigation is to be done, only that an employee has a right to representation, which can be waived. Dahl testified that management has no issue with Union representatives being present and encourages it. Dahl testified that during the week (Monday through Friday) it is easy to find a Union representative.

²³ Joint Exhibit #14.

On cross-examination, Dahl testified that Union Staff usually don't come to investigatory meetings as Stewarts are on paid time and are allowed reasonable time to attend them. Dahl testified that the Home always allows Stewarts to take time to attend and has never questioned "reasonable." Dahl testified that it would be rare to not have a Stewart available.

Dahl testified that she believes the waiver signed by the Grievant on April 10, 2006 constitutes a valid waiver of the Grievant's right to representation.

Union witness, Saleh Idris, Grievant, testified that he filed a complaint [March 13, 2006] that his supervisor (Kristin Edstrom) was discriminating against him as she was accusing him of not doing a good job.²⁴ Idris testified that he also filed an Affirmative Action Complaint [April 4, 2006] to the effect that Edstrom treated him differently than everybody on the floor, but didn't receive a response.²⁵ Idris testified that he filed another complaint [April 11, 2006] with Nancy Dahl, Director of Nursing that he needed help with Edstrom before things become worse, but didn't hear a response.²⁶

Idris testified that fighting with Christina for the cart was not the right thing to do and if it happened again he would let Christina take the cart without challenge.

Idris testified that he talked with Nancy Dahl about his letter dated March 13, 2006. He told her he wanted to be moved to a different unit with a different supervisor. He told her he liked the work but felt there was a problem with his supervisor, Kristin Edstrom. Idris testified that he was moved to a different work area (2-North) on March 22, 2006. Idris testified that he had no problems at 2-North. Idris said he was sorry that the incident on April 8, 2006 happened and felt that he was wrong.

²⁴ Joint Exhibit #15.

²⁵ Joint Exhibit #14.

²⁶ Joint Exhibit #16.

Idris testified that his statements made to Edstrom during her investigative interview with him regarding the April 8, 2006 incident were recorded by her, as he didn't write the words above his signature.²⁷

Idris testified that he is currently working 15 1/2 hours (two days) per week since December 2, 2006 at Home Depot and attending school Monday, Tuesday and Wednesday. Idris said he wants his job back and would not challenge someone taking his cart again. He said it would be helpful if someone could go over the policies in his native language.

On cross-examination, Idris acknowledged that his supervisor, Kristin Edstrom was not on the floor when the April 8, 2006 incident occurred.

On cross-examination, Idris acknowledged that his Affirmative Action Complaint does not contain the Human Resources stamp that is placed on documents received into that office, nor does it contain any acknowledgement of receipt by that office which is to be recorded on page 2.²⁸ Idris also acknowledged that he did not ask any employees listed as talking to Human Resources.

On cross-examination, Idris acknowledged that, based on his request, he was reassigned to work at 2-North rather than the unit he wanted to leave at 2-South.

On cross-examination, Idris acknowledged that carts are to be shared by employees and they do not contain the name of any employee.

On cross-examination, Idris acknowledged that he was not present when Christina took possession of the cart and takes no issue with what witnesses said they saw of the incident. He also acknowledged that today's hearing is the first time he has said he would not challenge Christina for the cart if the incident were to occur again.

²⁷ Joint Exhibit #5, pages 1-6.

²⁸ Joint Exhibit #14.

On cross-examination, Idris acknowledged he understood the violence prevention policy as he had filed a “Violence Prevention Report” under it alleging assault by a co-worker on June 10, 2005, which is identified as having been received by Human Resources.

On cross-examination, Idris acknowledged that there was an investigation into his complaint of threats by his co-worker and it is referenced in Edstrom’s notes.²⁹

Union witness, Shawn Barry, testified that he has worked at the Veterans Home for some 25 years and has been Chief Stewart off and on for about six (6) years.

Barry testified that the CBA, Page 44, Section 2, provides for Union representation or a waiver and he did not receive a waiver for the Grievant.

Barry testified that there was a discharge of a Food Service Worker for pushing a cart into co-worker.³⁰ Barry testified that another employee received a one-day suspension for use of profane, abusive and loud/boisterous language on campus premises.³¹ Barry testified that a GMW received a one-day suspension for violation of Work Rules #5 and #14.³²

Barry testified that he sees a large inconsistency in the discipline administered under the “Workplace Violence Policy” and feels the Grievant shouldn’t have been fired – “it was the wrong thing to do but the discipline is too severe for the violation – once it was over it was over, he made no follow-up threat – it was not fair that the Grievant was disciplined and not Christina.”

²⁹ Joint Exhibit #8.

³⁰ Union Exhibit #19.

³¹ Union Exhibit #20.

³² Union Exhibit #21.

On cross-examination, Barry acknowledged that he and two other Union representatives were present at the grievance meeting held on May 15, 2006³³ and that the CBA does not require the Employer to wait indefinitely for a Union Stewart to be present. Barry also acknowledged that, since there was no prior discipline of the Grievant, there had been no prior need for Union representation

On cross-examination, Barry acknowledged that there are different levels of discipline for offenses and it should be determined on a case-by-case basis.

On re-direct, Barry testified that the Employer could have waited until the next day for a Union representative to be present.

Employer rebuttal witness, Dee Reinking, testified she is the Director of Human Resources for the Veterans Home and has been there about six (6) months.

Reinking testified that the first time she saw the Grievant's Affirmative Action Complaint was while preparing the instant case for arbitration proceedings – it was in the green grievance file that originated after the third step grievance meeting.

Employer rebuttal witness, kristin Edstrom, testified that with respect to her investigative interview with the Grievant, she informed him to find a Union representative because Union representative Kim Chapman said she wouldn't do it. – Chapman told her she would not represent the Grievant because she was representing Christina and she [Chapman] had issues with the Grievant herself, explaining he is quick to anger and she had a threatening experience with him when she mistakenly reassigned his locker to a new employee.³⁴

³³ Joint Exhibit #17.

³⁴ Joint Exhibit #5, page 15.

DISCUSSION

The basic facts of the April 8, 2006 incident, prompting the Employer's decision to discharge the Grievant, do not appear to be in dispute.

Immediately prior to the April 8, 2006 incident the Grievant, after arriving for his shift and getting his work assignment, went to the stock room and began loading a cart with fresh water for delivery to resident rooms. As there were an insufficient number of carts for all workers to use at the same time, a co-worker (Ibsa) asked the Grievant if they could use the cart jointly. The ice machine was not delivering sufficient ice to fill all the containers so the Grievant and Ibsa agreed that Ibsa would deliver his water to residents first and return the cart for the Grievant's use.

The co-worker (Ibsa) finished his use of the cart and returned it to the stock room. Another employee, Christina, upon seeing the unused cart began loading her supplies in it. Ibsa informed her that the Grievant had planned to use the cart next but Christina proceeded to load the cart. Ibsa then located the Grievant and informed him that that he had returned the cart to the stock room but Christina was now using it.

The Grievant then went to the stock room and upon arriving there found Christina using the cart. The Grievant proceeded to take the cart away from Christina by force and a physical/verbal altercation for possession of the cart took place. The altercation continued for several minutes until Christina let go and walked away.

The altercation was witnessed by several other employees, including supervisors, who upon being distracted from their duties by the commotion between the Grievant and Christina, rushed to the scene to see what was causing the disturbance.

Some of the employees, including supervisors, witnessing the incident urged/ordered the Grievant to let go of the cart and offered him another cart as a means of ending the altercation. However, the Grievant continued taking the cart away from Christina.

The record indicates that, when the Grievant arrived at the stock room, Christina was loading the cart and standing behind it with her back to the stock room door. The Grievant approached Christina from her back, reached around her grasping the cart handle with one hand while holding the door open with the other and attempted to pull the cart away from her. In doing so, the Grievant pulled the cart into Christina. The result was a push and pull situation where Christina was sandwiched between the Grievant and the cart. Ultimately, Christina let go of the cart and left the area.

Christina complained of injuries, but continued working the balance of the shift but sought another employee's assistance in finishing her duties. Christina filed a "First Report of Injury" report and saw a doctor two days later, but there is no evidence that she was placed on any work restrictions.

That the Grievant would be provoked by Christina's using the cart he planned to use is understandable. He first allowed Ibsa to use the cart when he was already in process of getting it ready for his own use and then finds Christina using it when he had the expectation of using it next.

However, confronting Christina in a physical and verbal manner was clearly not an acceptable way of resolving the matter, especially considering the Employer's "Workplace Violence Policy" and Work Rules on "Prohibited Conduct." The evidence shows that the Grievant knew of these Policies and Rules or should have known of them as they are provided and reviewed with employees during employee orientation³⁵ and staff meetings.³⁶ The record shows that the Grievant was familiar with these Policies and Rules, as he had earlier filed a complaint himself when he felt threatened by another employee.

³⁵ Joint Exhibit #11

³⁶ Joint Exhibit #4

The Grievant's behavior in the April 8, 2006 incident was clearly in violation of the "Workplace Violence Prevention Policy."³⁷ The Policy defines "Violence" as:

"A violent act or threat (perceived or real) by a current . . . employee, , , with a current . . . employee."

The Policy further provides:

- C. "POLICY: It is the responsibility of this agency and its managers, supervisors and employees to maintain a campus free from threats and acts of violence. The agency will continue to provide a safe place for employees, residents and guests. Everyone who works on, lives at or visits an agency site will be treated with courtesy and respect. This will continue to be accomplished by encouraging mutual respect among all individuals, establishing open, honest and appropriate communication, and enforcing "zero tolerance" for any type of violent behavior. The agency's policy on work-related violence includes:
5. Incidents of work-related threats or acts of violence will continue to be treated seriously by the agency. Reports of all such acts are promptly investigated and management will take action, as necessary, to appropriately address each incident.
 6. The agency will take strong disciplinary action up to and including discharge from State employment, against employees of the agency who are involved in the commission of work-related threats or acts of violence." (Emphasis Added)

The Grievant's behavior in the April 8, 2006 incident was also clearly in violation of the Employer's "Operating Policy and Procedures" on "Prohibited Conduct:"³⁸

- "5. Use of profane, abusive or loud/boisterous language on campus premises, or actions, which may be discourteous or harmful to others . . .
9. Insubordination, including refusal to accept directives from supervisors, security officers, civil defense personnel or other proper authorities.
10. Unprofessional interaction with anyone on MVH-MPLS premises (including residents, their families, students, visitors, customers or other employees)

³⁷ Joint Exhibit #2.

³⁸ Joint Exhibit #3

when such behavior violates another's privacy or dignity, including sexual harassment.

14. Threats, fighting, or other physical action against another person while on MVH-MPLS premises.
16. Behavior which compromises another's safety or privacy or discloses confidential information, including medically-related records."

It is not clear from the record whether Christina knew of the Grievant's expectation to use the cart before she began using it. In any case, one can appreciate that her refusal to give it up once she knew of the Grievant's expectation could serve as a provocation to him. However, he had other alternatives to taking the cart from Christina with force and verbal abuse. He could have take the matter to a supervisor for resolution, checked around to see if another cart was available, or performed another part of his duties until a cart was available.³⁹ One can understand his frustration, but his failure to use a more civil approach to resolving the matter is inexcusable.

The Union raises the issue of disparate treatment and why Christina was not disciplined for her behavior. As noted earlier, it is not clear from the record whether Christina knew of the Grievant's expectation to use the cart at the time she first began to use it. Even if she did, it would appear to be more a matter of courtesy rather than a rule or policy violation.

To what degree Christina may have contributed to the physical and verbal altercation is not clear. Because the altercation continued for some time the indication is she, at least initially attempted to retain possession of the cart. The record indicates she was sandwiched between the cart and the Grievant and eventually let go of the cart and left the area. In any case, the record indicates the Grievant initiated the physical and verbal altercation and was in a position to be in control of the situation. This is confirmed by the testimony of other employees and supervisors who were witnesses to the incident and

³⁹ The testimony of Kristin Edstrom was that there was other duties the Grievant could have performed while waiting for Christina to finish use of the cart.

who urged/ordered him to stop. This indicates he was viewed as the aggressor, was in control of the situation and could stop it.

The Arbitrator is without sufficient facts to make a factual determination of Christina's complicity in the incident. In any event, based on the facts available, her involvement at worst would appear to be inconsiderate behavior.

A generally accepted definition of "just cause" is that the disciplined employee 1). Knew or should have known of the rule(s) violated, 2). A fair investigation of the alleged violation was conducted, 3). The employee was afforded an opportunity to explain his/her conduct, 4). The rule(s) violated is enforced uniformly and consistently and 5). The level of discipline is proportionate with the seriousness of the offense.

It is clear from the record that the Grievant knew of the violence Policy and Prohibited Conduct Rules. The investigation conducted by supervisor Kristin Edstrom appears well conducted and complete. It included statements from all known witnesses and others who had information related to the incident. The Grievant was given an opportunity to explain his side of the story via the CBA grievance process. Although at the investigatory interview the Grievant waived his right to Union representation, there were ample Union representatives present at the third step grievance meeting.

The record shows that other employees who have committed violations of the Employer's Policy and Rules have also been disciplined. One employee was discharged for pushing a cart into another employee and two other employees were suspended for less serious violations. Of the two employees suspended, one was charged with use of inappropriate language. The second employee was charged with violation of Rules #5 and #14, but the record does not contain sufficient information to allow the Arbitrator to evaluate whether the degree of discipline administered was consistent or inconsistent with the instant case.

The Arbitrator finds the Grievant's act of taking the cart from Christina by physical force a serious violation of the anti violence Policy and Rules. It clearly comes within the

definition of “strong disciplinary action up to and including discharge” as set forth in the “Workplace Violence Prevention Policy and Plan,”⁴⁰ and violates Prohibited Conduct Rules 5, 9, 11, 14, and 16.⁴¹

In determining the appropriate level of discipline, arbitrators commonly consider potentially mitigating factors such as the employee’s length of employment and prior work record. The Grievant had approximately one and one half years of service at the time of his discharge, which the Arbitrator does not find sufficient to constitute a mitigating factor. The Grievant’s work record, although not involving prior discipline, contains indications of performance problems.

The record shows that the Grievant’s performance from the time of his employment (September 27, 2004) through his first year was generally satisfactory. A mid-probationary appraisal⁴² indicated that although the Grievant’s performance was checked as satisfactory, Edstrom had talked to the Grievant about being more careful about resident safety, i.e. securing chairs when transferring residents into the bath tub. A resident had fallen to the floor when the Grievant had not locked the chair in which the resident was being transferred.

The Grievant’s probationary (six month) and annual (one-year) performance evaluations are also a part of the hearing record⁴³ and show him to have met expectations. The Grievant next performance evaluation was scheduled for approximately the time of his discharge and was not completed.

The testimony of the Grievant’s supervisor, Kristin Edstrom revealed several concerns with the Grievant’s performance that evolved since his last performance evaluation of October 10, 2005. Edstrom described the Grievant as “sully” for the most part and one of three employees with which she experienced problems. Edstrom explained he did his job

⁴⁰ Joint Exhibit #2, C, 6.

⁴¹ Joint Exhibit #3.

⁴² Joint Exhibit #7.

⁴³ Joint Exhibit #12.

but not always well. She talked to him numerous times about performance concerns. She gave an example of him placing dentures in the cup without first cleaning them. Edstrom described the Grievant as not being responsive to her efforts to coach him and felt he was not always listening. Because she was coaching him to improve his performance, he complained that she was picking on him.

Edstrom described an incident that occurred in late October 2005. A co-worker reported the Grievant had threatened him when the co-worker told the Grievant he should have answered a call light instead of sitting in the dining room and ignoring it. The co-worker reported that the Grievant became angry and followed him around during the rest of the shift, attempting to engage him in a confrontation. The co-worker reported that later the Grievant again threatened him in the locker room saying, "I'm watching you, my eyes are on you - I'm going to f___ with you." Edstrom met with the Grievant and a Union representative to review the matter. The Grievant denied the accusations but was advised on proper conduct and the "Zero Tolerance Policy" against any form of violent behavior. The Grievant was also advised of his responsibility to cooperate with other workers when they needed assistance.

Edstrom described an incident that occurred in February 2006 when a Nurse reported her concerns about the way the Grievant treated resident K.G. The Nurse reported that the Grievant did not want to answer the call light of this resident stating his shift was almost over and the next shift can take care of it. The Nurse reported that she directed the Grievant to accompany her to care for the resident but the Grievant treated the resident roughly and left abruptly. Edstrom later met with the Grievant to review the matter. She instructed the Grievant that he was to continue working until the end of this shift and emphasized that residents are vulnerable and are to be treated with dignity and respect at all times. Edstrom instructed the Grievant that if he needs help with a situation he is to ask co-workers, the nurse or OD.

Edstrom testimony was that if the performance evaluation due in April 2006 would have been completed it would have been less favorable than the previous evaluations and would have shown the Grievant to need improvement in several areas.

Based on the record, the Arbitrator does not find the Grievant's work record to be of a quality to mitigate in favor of his retention. The Arbitrator finds sufficient comparability between the facts in the instant case and the discharge matter referenced in Union Exhibit 19 to conclude the basis for discharge in both cases is reasonably consistent.

The Arbitrator finds that the Grievant's violation of the Employer's Workplace Violence Prevention Policy" and "Prohibited Conduct Rules" to be sufficiently serious to warrant discharge. The Arbitrator does not find the Grievant's length of employment or work history to be sufficient factors to mitigate the severity of the disciplinary action taken.

AWARD

The grievance is denied. The Arbitrator finds that the Grievant's discharge is not in violation of the CBA.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 9th day of February 2007 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR